# Supreme Court of the United States

OCTOBER TERM, 1951

No. 670 - 32

CLYDE BROWN,
PETITIONER,
*v.*
ROBERT A. ALLEN, WARDEN OF THE CENTRAL PRISON OF NORTH CAROLINA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF FOR RESPONDENT

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IN THE

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## OPINIONS BELOW

The opinion of the District Court denying petitioner's application for a writ of habeas corpus (R. ) is reported at 98 F. Supp. 866. The opinion of the Court of Appeals is reported at 192 F. 2d 477.

## JURISDICTION

The Judgment of the Court of Appeals, affirming the order of the District Court,* was entered November 5, 1951 (R. ). The petition for writ of certiorari was filed January 31, 1952. Certiorari was granted March 24, 1952. The jurisdiction of this Court rests on 28.U.S.C.A. 1254(1).

*In his brief petitioner says: "The judgment of the Court of Appeals, affirming the order and judgment of the District Court *vacating the writ of habeas corpus theretofore issued by said District Court, . . .*" This is in error. The order of the District Court of July 19, 1951, reads: ". . . The petition for a writ of habeas corpus be and the same is hereby denied, . . ." (R. )

## QUESTION INVOLVED

WHETHER THE DISTRICT COURT ERRED IN NOT FORTHWITH ISSUING THE WRIT OF HABEAS CORPUS, HAVING THE PETITIONER PRODUCED BEFORE HIM IN ANSWER TO IT AND TAKING ORAL TESTIMONY AS TO THE MATTERS AND THINGS ALLEGED.

## STATUTE INVOLVED

Section 2243, Chapter 153—HABEAS CORPUS, Title 28, U.S.C.A., provides as follows:

"§ 2243. Issuance of Writ; return; hearing; decision—

"A court, justice or judge entertaining an application for writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

"The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

"The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

"When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

"Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

"The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

"The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

"The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require. June 25, 1948, c. 646, 62 Stat. 965.

# STATEMENT

On the 16th day of June, 1950, Betty Jane Clifton, a young white girl who had just finished the Tenth Grade in school, was assaulted, brutally beaten and raped in her father's radio shop which she was keeping for him in his absence. She was hospitalized and remained in the hospital until August 10th (Dr. Goswick, S. R. 63). She was unconscious for a considerable part of that time and was in a semi-conscious condition for approximately a month (Dr. Goswick, S. R. 61). When assaulted she had been raped (Dr. Goswick, S. R. 62-63).

The crime was committed on Friday. On Monday, June 19th, petitioner was apprehended for questioning. He was questioned and his story was checked on Monday, Tuesday, Wednesday and Thursday. Two warrants were sworn out and served on him on Saturday, June 24th. One charged him with rape, the other with assault with a deadly weapon with intent to kill. On the 7th day of July, 1950, petitioner waived preliminary examination and was bound over to September 3, 1950, Term of the Superior Court of Forsyth County (R. ). The Grand Jury which later found a true bill of indictment against petitioner was drawn and organized on Wednesday, July 5, 1950 (R. ). A true bill on the indictment for rape was found by the Grand Jury September 4, 1950 (R. ). In apt time petitioner moved to quash the bill of indictment returned by the Grand Jury. This motion was overruled in accordance with the findings of fact and order entered by the judge and he was subsequently placed on trial. The petitioner was convicted of the capital crime of rape at the September, 1950, Term of the Superior Court of Forsyth County (R. ) and was sentenced to death by asphyxiation (R. ).

Petitioner appealed to the Supreme Court of North Carolina at the Fall Term, 1950. In this appeal he presented to the Supreme Court eight questions, some of which involved the same questions of law as are presented here and as have been presented throughout these proceedings in the Federal Courts (R. ); (Resp. Brief Opposing Cert. pp. 3-4). The Supreme Court of North Carolina found no error and its opinion, filed 2 February, 1951, is reported as STATE v. BROWN, 233 N. C. 202, (R. ).

Petitioner than filed a petition with the Supreme Court of the United States for a writ of certiorari to the Supreme Court of North Carolina 28 April, 1951, (R. ), with supporting brief (R. ). The State of North Carolina, respondent, filed a brief opposing the issuance of the writ (R. ). The Supreme Court of the United States denied the writ May 28, 1951, (R. ), 341 U. S. 943, 95 L.ed. 1369.

Petitioning in forma pauperis petitioner filed an application for a writ of habeas corpus with the District Court of the United States for the Eastern District of North Carolina on June 21, 1951, seeking release on the grounds of (a) systematic racial discrimination from the Grand Jury and (b) incompetency of the confession admitted in evidence. (R. ). A show cause order was issued the same day directed to respondent's predecessor, Warden of Central Prison, directing that he appear on the 5th day of July, 1951 and show cause why the writ of habeas corpus prayed for should not issue and make a return or answer the petition. This order also stayed execution of the petitioner. (R. ). The respondent filed answer to the petition in due time (R. ). In this answer he referred to all the proceedings in the Supreme Court of North Carolina, including the opinion of said Court as officially reported, and all proceedings in the petition to the Supreme Court of the United States for writ of certiorari to the Supreme Court of North Carolina, and made all said proceedings a part of the answer and further answer as if fully copied therein and set forth. At the hearing on the return date of the show cause order, which was had in Raleigh, authenticated copies of all of the said proceedings were offered in evidence by respondent. These were introduced in evidence as Exhibits and made a part of the record, as follows:

Exhibit No. 1. The transcript of the record on appeal in the Supreme Court of North Carolina.

Exhibit No. 2. Petition to United States Supreme Court for Writ of Certiorari to the Supreme Court of North Carolina.

Exhibit No. 3. Attested copy of Order Denying Petition.

Exhibit No. 4. Addendum to Record, Supreme Court of North Carolina.

Exhibit No. 5. Defendant's Brief, Supreme Court of North Carolina.

Exhibit No. 6. State's Brief, Supreme Court of North Carolina.

Exhibit No. 7. State's Brief to Supreme Court of United States Opposing Petition for Writ of Certiorari to the Supreme Court of North Carolina.

Exhibit No. 8. Official Advance Sheet of the North Carolina Supreme Court containing opinion of STATE v. BROWN.

On July 19, 1951, the District Court made certain findings of fact and conclusions of law (R. ) entered a memorandum opinion (R. ), and entered an order denying the writ of habeas corpus, dismissing the petition, and vacating the stay of execution (R. ). Whereupon, petitioner gave notice of appeal to the United States Court of Appeals for the Fourth Circuit, which notice was filed in the District Court August 6, 1951. (R. ).

On the 5th day of November, 1951, the said Court of Appeals handed down an opinion affirming and sustaining the opinion and judgment of the District Court. (R. ). The mandate, containing this opinion, was certified to the District Court December 6, 1951. On December 20, 1951, an order was entered by the District Judge staying execution of the sentence and judgment against the petitioner. In his petition filed Januray 31, 1952, petitioner applied to this Court for a writ of certiorari to the Court of Appeals for the Fourth Circuit to review the matter. Certiorari was granted March 24, 1952.

In the trial of the Superior Court of Forsyth County, upon petitioner's motion to quash the bill of indictment, evidence was taken from eight witnesses and at least two exhibits were introduced (R. ). After hearing all the evidence offered the motion was denied and the presiding judge entered an order finding certain facts and making certain conclusions of law to the effect that the Grand Jury was in all respects lawfully constituted; that the Constitution of the United States and the Consitution of North Carolina, and the General Statutes of North Carolina, and any and all Public-Local Acts relating to the preparation of the jury lists and the drawing

of the Grand Jury for the July 3, 1950, Criminal Term of the Superior Court of Forsyth County, which was the jury that found the bill against the petitioner, had in all respects been complied with. (R. ).

During the trial of the case the petitioner objected to certain testimony in regard to his confession. The judge sent the jury from the courtroom and heard the evidence, including the statement of petitioner himself with regard to the circumstances under which the confession was made. (R. ). After hearing all the evidence the counsel for petitioner desired to offer, the court found as a fact that the statements were freely and voluntarily given and were competent (R. ).

## SUMMARY OF ARGUMENT

In this case the District Court issued a show-cause order (R. ): Respondent filed answer (R. ), and by reference incorporated therein the full proceedings in the Supreme Court of North Carolina (R. ) and upon petition to the United States Supreme Court for Certiorari to the Supreme Court of North Carolina (R. ). At the hearing had on the return date of the showcause order these court records were introduced in evidence as eight exhibits (R. ). Thus, the court was able to view the facts on which the opposing parties relied and upon the incontrovertible facts found that applicant was not entitled to the writ (R. ). This procedure is authorized by statute and is approved by this Court. Therefore, the District Court committed no error in denying the petition for writ of habeas corpus and the Court of Appeals was correct in affirming the order of the District Court.

When petition was filed with this Court for writ of certiorari to the Supreme Court of North Carolina, Case No. 488. October Term, 1950, the questions involved were designated as two and they were as follows:

1. WHETHER OR NOT THERE HAS BEEN UNLAWFUL DISCRIMINATION AGAINST PERSONS OF THE NEGRO RACE IN THE SELECTION AND CONSTITUTION OF GRAND JURIES IN FORSYTH COUNTY, INCLUDING THE GRAND JURY WHICH INDICTED PETITIONER, SOLELY FOR REASON OF RACE OR COLOR, RESULTING IN DEPRIVA-

TION OF THE EQUAL PROTECTION OF THE LAWS GUARANTEED PETITIONER BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

2. WHETHER THE ALLEGED CONFESSIONS ADMITTED IN EVIDENCE WERE OBTAINED AS A RESULT OF FEAR, DURESS, COERCION, OR OTHER UNLAWFUL CIRCUMSTANCES, WHEREBY THE CONVICTION OF AND SENTENCE IMPOSED UPON PETITIONER RESULTED IN A DEPRIVATION OF HIS LIFE AND LIBERTY WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

These same question were enumerated among the eight in petitioner's appeal to the Supreme Court of North Carolina, Case No. 721, Fall Term, 1950. There they were stated as follows:

3. DID THE COURT ERR IN REFUSING TO GRANT DEFENDANT'S MOTION TO QUASH THE BILL OF INDICTMENT, WHICH SAID MOTION WAS MADE BY AND UPON SPECIAL APPEARANCE OF THE DEFENDANT BEFORE PLEADING TO SAID INDICTMENT BECAUSE THE GRAND JURY BY WHICH SAID INDICTMENT WAS RETURNED WAS UNLAWFULLY CONSTITUTED?

5. DID THE COURT COMMIT ERROR IN FINDING AS A FACT AND RULING THAT CERTAIN STATEMENTS MADE BY THE DEFENDANT, UNDER THE CIRCUMSTANCES OF THIS CASE, WERE FREELY AND VOLUNTARILY MADE, AND, THEREFORE, AMOUNTED TO AN ADMISSIBLE CONFESSION ON THE PART OF THE DEFENDANT?

In passing upon the petition for writ of habeas corpus, the District Court had before it for its consideration the full record of the proceedings, briefs, etc., of the petitioner before the Supreme Court of North Carolina, and also the petition to the Supreme Court of the United States for writ of certiorari to the Supreme Court of North Carolina and brief in support thereof. (R. ). No new allegation of facts was made in the petition for writ of habeas corpus to the District Court from what was contained in the petition to the Supreme

Court of the United States for writ of certiorari to the Supreme Court of North Carolina (R. ). The arguments presented by the petitioner in support of his petition for writ of habeas corpus to the District Court are the same as the arguments in the brief to the Supreme Court of the United States in support of his petition for writ of certiorari to the Supreme Court of North Carolina (R. pp. ), and the citations of laws in each are identical R. pp. ). Therefore, the District Court's procedure was in the manner approved by this Court in WALKER v. JOHNSTON, 312 U. S. 275, 85 L. ed. 830 and the Court of Appeals was correct in finding that, "In the Brown case the petition for the writ was denied without hearing, on the basis of it procedural history. We think that dismisal in both cases was clearly right." (192 F. 2nd 477, 478.).

## ARGUMENT

### I

### THE ISSUE AS TO WHETHER PERSONS OF THE NEGRO RACE WERE UNCONSTITUTIONALLY EXCLUDED FROM THE GRAND JURY WAS PASSED UPON BY THE TRIAL COURT ADVERSELY TO PETITIONER; UPON APPEAL IN WHICH THE SAME QUESTION WAS RAISED THE SUPREME COURT FOUND NO ERROR IN THE TRIAL; AND PETITION TO THE SUPREME COURT OF THE UNITED STATES FOR WRIT OF CERTIORARI TO REVIEW JUDGMENT OF THE STATE SUPREME COURT WAS DENIED. THIS ISSUE CANNOT NOW BE QUESTIONED OR RETRIED ON THE SAME EVIDENCE IN A HABEAS CORPUS PROCEEDING IN FEDERAL COURT.

In his first three questions directed to the Supreme Court of North Carolina petitioner attacks the legality of the Grand Jury which indicted him. He contends that G. S. 9-1 "imposed a mandatory duty on the jury commission of the several counties of North Carolina to do more than refer to the tax returns of the several counties in making up jury lists from which grand and petit juries were to be drawn."

The late Chief Justice Stacy, in writing the opinion for the court, met this contention squarely and answered it as follows (STATE v. BROWN, 233 N. C. 202, 206):

"Whatever may be the holdings in other jurisdictions, it is thoroughly settled by our decisions that the provisions of the statute now in focus are directory, and not mandatory, in the absence of proof of bad faith or corruption on the part of the officers charged with the duty of selecting the jury list: S. v. MALLARD, 184 N. C. 667, 114 S. E. 17, and cases there cited. Not only has no bad faith or corruption been shown on the part of the officers here, but none has so much as been suggested. S v. SMARR, 121 N. C. 669, 28 S. E. 549. Hence, the motions to quash and in arrest were properly overruled. It may be added, also, that the motion in arrest was inappropriate for defendant's present purpose, as matters sought to be challenged are not apparent on the face of the record. S. v. SAWYER, ante, 76, 62 S. E. 2d 515; S. v. McKNIGHT, 196 N. C. 259, 145 S. E. 281, and cases there cited."

Wherefore, insofar as the petitioner's contention that G. S. 9-1 requires, as mandatory, the use of lists other than the tax returns in preparing jury lists for grand and petit juries is concerned, the Supreme Court of North Carolina definitely answered this contention and stated that the statute was not mandatory. This court refused to review their opinion upon petition for a writ of certiorari. Therefore, it is now the law in the case and was when the petition for habeas corpus was presented to the District Court and the petitioner had no right to raise the question by habeas corpus in the Federal District Court.

Even if petitioner could overcome this hurdle, he would be faced with the burden of alleging and proving, not conclusions or inferences, but primary facts that show, notwithstanding strong presumption of constitutional regularity in the state proceedings, that in his prosecution the state so departed from constitutional requirements as to justify a federal court's intervention to protect his constitutional rights. LYLE v. EIDSON, C. A. Tex. 1950, 182 F. 2nd. 344. Where a prisoner seeks remedy of habeas corpus to secure his release from confinement imposed by judgment or sentence of a court, he has burden to establish essential facts entitling him to such relief as a demonstrable reality and not as a matter of speculation. DARR v. BURFORD, 339 U. S. 200, 94 L. ed. 761, 70 S. Ct. 587; Re CUDDY, 131 U. S. 280, 33 L. ed. 154, 9 S. Ct. 703; JOHNSON v. ZERBST, 304 U. S. 458, 468, 82 L. ed. 1461, 1468, 58 S. Ct. 1019, 146 A.L.R. 357; WALKER

v. JOHNSTON, 312 U. S. 275, 286, 85 L. ed. 830, 835, 61 S. Ct. 574; HAWK v. OLSON, 326 U. S. 271, 279, 90 L. ed. 61, 67, 66 S. Ct. 116.

With regard to petitioner's contention that there was racial discrimination against Negroes in the matter of jury list, note the evidence adduced and considered by the presiding judge at the trial September, 1950, Term of the Superior Court of Forsyth County. This evidence occupies 27 pages of the transcript of the record on appeal to the Supreme Court of North Carolina (Tr. pp. 22-49); the petitioner's evidence taking 17 of these pages, going from page 22 through page 39. The presiding judge's findings of fact, conclusions of law, and order denying the motion to quash the bill of indictment occupies three full pages (Tr. 49-52).

In considering this phase of the matter it is well to consider the manner in which jury lists are made up and Grand Juries are selected in North Carolina and distinguish that procedure from the procedure in some of the other states. For instance, petitioner cites the case of CASSELL v. TEXAS, 339 U. S. 282, 94 L. ed. 839, 70 S. Ct. 629, in support of his contention that the number of Negroes selected for Grand Jury service has been proportionally limited and that such limitation violates the constitution. The attention of this Court, however, is directed to the different method of selecting grand juries in Texas. For the Court's convenience there is included in the appendix, p. 49, the pertinent sections of the Texas Criminal Code relating to the selection of grand juries.

The respondent respectfully submits that the North Carolina system of selection of jurors is distinctly different and, therefore, the holding of this Court in a Texas case would not necessarily control North Carolina. In Texas grand juries are selected by jury commissions appointed by the Court. These jury commissions select 16 names to serve as grand jurors. These 16 names are placed in an envelope and delivered to the judge. At the proper time, the envelope is opened, the Clerk makes up the proper order and delivers it to the Sheriff, who summons the grand jurors to appear at the proper term of court. This method is purely a *selective* method. The procedure specified in the North Carolina Statutes provides for a certain number of jurors for each term of court to be drawn from the

box containing the jury scrolls: The statute also provides that these names are *drawn by lot*—not selected. From the number drawn and appearing at the January and July Terms of the Forsyth County Superior Court, the names of the jurors present being put into a hat, 18 jurymen are drawn by a child under 10 years of age and they constitute the grand jury. From this it may well be seen that the selection of a grand jury in North Carolina is done *by lot* rather than by selection.

Because of the method of selecting grand juries in North Carolina, it will be necessary to refer in this brief to jurors other than members of the grand jury. Therefore, although the petit jury is not questioned in this case, some of the references which follow will of necessity refer to veniremen who may have served as petit jurors as well as grand jurors.

Some of the high lights of the evidence adduced at the trial bearing on this question are as follows:

> *It was agreed* between counsel for petitioner and the Solicitor, and the agreement was approved by the presiding judge, that in the selection of the trial jury there were 37 regular jurors called, of which at least 8 were members of the Negro race (21%); that there were 20 special veniremen called, of which at least 3 were members of the Negro race (15%) (Tr. 24).

> *John Click*, IBM Supervisor in the office of the Tax Supervisor of Forsyth County, testified: "I furnish a list of all taxpayers in Forsyth County that are of age and residents. I make the list up once every two years and present it at the commissioners' meeting the first week in June, and that is supposed to be a list of all the taxpayers, regardless of whether they are white or colored. My cards are not separated as to white taxpayers and colored taxpayers, they are all together, white and colored, for each township in our whole county. They are alphabetically arranged. . . . That machine is able to think for itself. It takes them all . . . When the time came to make up the list of taxpayers for Forsyth County from which I understood the jury list for the June and July meeting of the county commissioners of 1949 would come, all of my cards were commingled, irrespective of race, white or colored, and they were placed in my machine and the only distinction between any of the cards was with reference to the persons under 21 years of age and non-residents. In running those cards through the machine, there is no distinction made whatever. . . . When I presented the tax list

to the county commissioners last June, 1949, there was nothing on that tax list to indicate whether the persons who were listed there were colored or white. . . . There is nothing on the face of the slip to indicate or show whether he is white or colored, that is, on this last list that I made up.

"I did not exclude any name from the list I furnished to the county commissioners at the request of Mrs. Eunice Ayers (the Register of Deeds) and assisted her in making, because of race or color or creed. . . . I have no knowledge of what percentage of the list is white or what percentage of the list is colored.

"The list I prepared was prepared from all the taxpayers or persons listing taxes, regardless of what kind of taxes, whether it was poll tax, personal property taxes or freehold, and I put all those names on the list except the nonresidents and the ones under 21 years of age. I know nothing about the law in regard to the qualifications." (Tr.24-28)

* * * * * * * * *

*Mrs. Eunice Ayers* (Register of Deeds, who is by law Clerk to the Board of County Commissioners): "The list of taxpayers which Mr. Click testified is prepared every two years and handed over to the County Commissioners is presented to the County Commissioners in regular session; of course, I am present. I have nothing further to do with the list after it is presented . . . except to go ahead with the procedure of presenting them in the box when the proper time comes.

"After the names are cut apart and made of uniform size, they are placed in Box No. 1, and the jury is drawn at the regular sessions of the County Commissioners, and I am not present at the jury drawings. I am present at the June meeting and the July meeting. At the June meeting the list is presented and then the old names are taken out of the box and all the names are put into Box No. 1, the first side of the box. . . . The list from which the present grand jury was drawn was made up in June, 1949. . . . Approximately 40,000 persons or prospective jurors were concerned when I prepared the list. The pieces of paper that I handled had no indication whatsoever, that I could determine, as to whether they were white or colored. . . . The about 40,000 names on the list I have described as having been furnished to the commissioners at the June, 1949 meeting were all the names that were placed in the box. There was no name whatso-

ever excluded from that box from that list. . . . After the box was prepared for use it contained the names of all tax listers in Forsyth County, regardless of race. Those names were taken from the 1948 list, the list for the previous year." (Tr. 28-31)

* * * * * * * * * *

*Nat S. Crews*, County Attorney for Forsyth County: ". . . I was present in June when the jury list was made up, the list from which this present jury, that is serving this term of court, was drawn. . . . The minutes of the meeting, in part, reveal that . . . 'Mr. Click explained to the Board of Commissioners the manner in which this list was prepared by the IBM machines, and stated that in the preparation of this list there was no discrimination whatsoever as to race, color, and so forth, Mr. Click stating the following: 'The jury list which is being presented to the Board of Commissioners at the June 6, 1949, meeting was prepared from the 1948 IBM card file and represents the tax returns of Forsyth County for the year 1948. . . . The cards used in selecting the jury list which is being presented has produced a complete list of eligible persons without discrimination whatsoever, and every effort has been made to strictly comply with the provisions of Section 9, subsection 1 of the General Statutes of North Carolina as amended'." . . . "The Board of Commissioners were of the opinion and so orderd that the list be confined to the tax returns; that to use other sources of information would cause a duplication of names in the jury list and also would result in placing in the jury box many names of persons who were not qualified to serve, etc. The Board of Commissioners, upon examination of the jury list containing the tax returns of 1948 as above explained, ordered that the entire list be used so that there will be no discrimination as to persons and orderd that said list be the jury list of Forsyth County for the purposes set forth in the General Statutes of North Carolina relating to same. . . ."

"The Board of Commissioners for the county of Forsyth met July 11, 1949, . . . On page 373 of the Minutes of the Board this appears: 'The Board of Commissioners having at the June 6, 1949 meeting, . . . selected the names of persons for jury duty and ordered that said list of names constitute the jury list of Forsyth County and preserved as such, and did cause the names of said jury list to be copied on small scrolls of paper and put into a box which is used for said purposes, and did, before placing said names in said box, take therefrom all names of persons.

from said box and did destroy same, . . . the names of said jurors on the new jury list, which appeared on small scrolls of paper of equal size, being placed in Division 1 of said jury box'."

"I was present at the June 5, 1950, meeting of the Board of Commissioners for the County of Forsyth. . . . On page 431 of the minutes this appears: 'A jury was drawn in accordance with the law made and provided for the following weeks of Superior Court. July 3rd, Criminal, sixty (60) names from which the Grand Jury is selected. July 10th, Criminal, forty-four (44) names. A list of the persons drawn is on file in the County Attorney's office, to which reference is hereby made. The names were drawn by a little boy who was brought to the Commissioners' meeting upon request of the Commissioners by one of the deputies sheriff. The little boy who drew the names out of the box, drawing 60 names first, and then drawing 44 names, according to the record.

". . . The meetings take place as indicated here, in the Small Courtroom, and the jury box is opened to Division No. 1. The little boy stands on a chair or table, where he can reach it, and pulls the names out of the box. The three Commissioners sit behind two tables and they pass the names on down to my secretary, who writes the names on the jury orders. At the conclusion of the meeting the jury orders are signed by the Clerk to the Board and delivered to the Sheriff so the persons appearing thereon may be summoned for jury service. At that meeting and at that drawing there is no determination made as to the qualification of prospective jurors, to my knowledge.

"On this occasion I don't recall that there was any occasion for leaving from that list any name. There is no procedure, to my knowledge, and I am present, to systematically eliminate persons of the Negro race. I was present at that drawing. On that occasion there was no determination made as to the qualification of any name drawn by the little boy, that I know of. All of the 60 and all of the 44 names that were drawn by the little boy were listed and accepted and handed over to the Sheriff's Department for summoning, to my personal knowledge. . . . We do know that for 1948 the tax list, which is the foundation for this present Grand Jury, that the proportionate number or percentage of persons listing property for (or) polls, it is about 85% or 84% white and only 16% colored. . . . I would say that that is a pretty good

index as to the number of white persons on the tax lists and the number of colored persons, as to the percentages." (Tr. pp. 31-38)

* * * * * * * * *

*Howard W. Floyd:* "I am Courtroom Clerk here. As such I was present in July, 1950, when the Grand Jury was made up for this present term of court. I supervised the drawing under His Honor's direction. I cut the names up and placed them in a hat and then a child, who was present in the Courtroom, drew the names out of the hat. The child gave me the names as they were drawn from the hat. 18 names were drawn. I called the names of the jurors out and had them come up and sit in the jury box, and they constituted the Grand Jury. The other names left in the hat were summoned as petit jurors. All the names that were drawn were white, except one, Mrs. Mary Y. Matthews.

"There was no occasion at that drawing of those names to take out any name because of being a non-resident, or deceased, or any other reason. The list was brought to me from the Sheriff's office and beside of the name was marked 'summonded' or 'not summoned' as the case may be. I did not put in the hat the names marked 'not summoned'. The names marked 'summoned' were placed in the hat, and the first 18 names coming out of the hat, drawn by the child, were the ones serving as Grand Jurors for this term. . . . A child of between 3 and 4 years of age drew those names out of the hat. The child could not read, to my knowledge. As the child drew each name out of the hat, he handed it to me; I called the name of the juror out, and that juror then became a member of the present Grand Jury, which passed on the bill of indictment in this case. No name drawn by that child was excluded from the Grand Jury, for any reason. There were only 18 names drawn, and they are the ones on the Grand Jury. There was no attempt on my part to place part of the names in one part of the hat and part in another; the names given to me on the list were thoroughly mixed up in the hat, and the first 18 names drawn from the hat then became the present Grand Jury." (Tr. 38-39)

* * * * * * * * *

*Jack Gough:* ". . . I am Deputy Sheriff of Forsyth County, serving under Sheriff E. G. Shore. . . .

"A list of 60 names was brought into our office by Mr. Crews' secretary after the June meeting of the County Commissioners, which was to constitute the jury list for

the July 3, 1950 Term of Court. All of the persons named on that list, that could be found, were summoned to appear at the July 3, 1950, Term of Court. I don't remember the number of persons summoned. I do recall that there were colored people, members of the Negro race, summoned for the July 3rd Term of Court; I don't know the exact number; it was four or five.

"I recall that members of the Negro race have served here as jurors in previous terms of court.

"My independent investigation revealed that for the week of January 10th, for which week 54 jurors had been drawn . . . . there were five or more colored men or women on that particular week to my knowledge . . . July 4, 1949, for which week there were 60 names drawn —. . . there were six or more members of the colored race. January 9, 1950, for which week 60 names were drawn, there were five or more members of the colored race. July 3, 1950, for which week 60 names were drawn, there were four or more members of the colored race.

". . . On June 12, 1950, from 44 names drawn there were four members of the colored race—in each case it could be more. My references are to persons of the colored race that I know and have identified positively as being of the colored race.—June 19th, out of 44 jurors drawn, there were five or more members of the colored race. July 10, 1950, out of 44 jurors, there were five or more members of the colored race. September 5th, which is our present week, out of 44 jurors there, were six or more members of the colored race. September 11, 1950, which will be our term next week, out of 44 jurors there are 7 or more members of the colored race. September 18, 1950, for that week, out of 44 jurors there are 5 or more members of the colored race. . . .

". . . I have been here four years and I have yet to see a jury in the box or sitting back in the courtroom on which there wasn't at least one member of the Negro race." (Tr. pp. 40-42)

* * * * * * * * *

*Roy W. Craft:* ". . . I am Chairman of the Board of County Commissioners for Forsyth County, and I was serving in that capacity during June of 1949. At that time Mrs. Eunice Ayers presented to the Commissioners a list of the tax listers of Forsyth County. There was nothing on that tax list to indicate to me whether any person whose name appeared thereon was a member of the Negro or white

race. We instructed Mrs. Ayers to prepare that list by cutting the names apart in a uniform manner and presenting them at the July meeting, after scanning the list. Of course we did not take the time to read the entire 40,000 names, but we did glance through it, the Commissioners did, and we passed it on with the instructions to prepare it for our coming meeting. . . . it included all the names that appeared on the tax list, excluding non-residents and persons under the age of 21 years.

". . . All of the names that had been presented to the Commissioners at the June meeting were placed in that box in Section No. 1. The box is right here in the courtroom. None of the names presented to the Commissioners at the June meeting was excluded from the box.

"I was present at the June 1950 meeting when the 60 names were drawn for the July 3rd Term of Court. I saw the child draw those names from the box. The child is supplied by the Sheriff's Department. It isn't always the same child, but it is usually a very young child, certainly under the age of ten, and he is placed on a chair or up on the table alongside of that tall box, so he can reach in. The child draws them out one at a time and they are passed on by the Commissioners down to Mr. Crews' secretary, who copies them on the jury list. There were no names excluded at the July 3rd meeting, to my knowledge. They were all turned over and listed on the jury list for the July 3, 1950, Term immediately after they were drawn—not two hours later, but immediately. . . . At that meeting or any other meeting, the only way I could determine whether the persons whose names are drawn are white or colored is from personal knowledge of the individual. Occasionally I know them. I don't know them all, white or colored.

"In originally placing the list in the box at the June-July meeting, 1949, there was no effort made by me or the Commissioners to either exclude or limit the number of people of the Negro race in that list. . . . That was a complete list of all the tax listers in Forsyth County for the year 1948, both white and colored, with the exception of those under 21 years of age and those known to be dead.

"At the June 1950 meeting, when the 60 names were drawn from which the present Grand Jury were taken, there were no names excluded for any reason from the names drawn by the child from that box. There was no effort made at that meeting on the part of myself or

any other member of the Board of Commissioners to limit or to exclude the name of any colored person from that jury list." (Tr. 42-45)

* * * * * * * * *

*Nat S. Crews* (Recalled by the Court) . . . "In this county, we draw a Grand Jury the first week of the January Term, which serves for six months, and then at the July Term we draw another Grand Jury, which serves until the following January. Our grand juries serve for six months. We have a special statute for the county, enacted in 1937, which was amended in 1947 and again in 1949. . . . The present Grand Jury was selected on the 5th day of July of this year, that being the first day of the July Criminal Term, and that Grand Jury is still serving and will continue to serve until a new Grand Jury is selected in January." (Tr. 45-46)

* * * * * * * * *

A careful study of the opinion of the North Carolina Supreme Court in STATE v. BROWN, 233 N. C. 202, should satisfy this Court that the jury question which the petitioner sought to raise by habeas corpus in the federal district court was clearly and fully passed upon and decided in the State Supreme Court. The late Chief Justice Stacy, writing the opinion for the court, says at pages 205-206:

"Putting aside any consideration of formal matters, which are not without substance, however, the only real questions sought to be presented on the appeal are: *first*, whether the jury list was selected from the legally prescribed source; and, *secondly*, whether the defendant's confession was voluntary.

"*First. The Jury List.* Prior to 1947, it was provided by G. S. 9-1 that the tax returns of the preceding year for the county should constitute the source from which the jury list should be drawn, and this was then the only precribed source. To meet the constitutional change of the previous election making women eligible to serve on juries, the statute was amended in 1947 enlarging the source to include not only the tax returns of the preceding year but also 'a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age,' to be prepared in each county by the Celrk of the Board of Commissioners.

"It was made to appear on the hearing that the Com-

missioners used only the tax returns of the county for the preceding year in selecting the jury list for the September Term, 1950, Forsyth Superior Court, from which the grand jury was drawn that performed the accusation against the defendant. This circumstance, the defendant contends, resulted in discrimination against Negroes or jurors of African descent, the race to which he belongs. The conclusion, it seems to us, is far-fetched and clearly a *non sequitur*. It rests only in imagination or conjecture. The defendant must show prejudice, other than guess or surmise, before any relief could be granted on such gossamer or attenuate ground. There was no challenge to any member of the jury, grand or petit, and no suggestion that any was disqualified. Indeed, the trial court was at pains to see that every opportunity was afforded for the selection of a fair and impartial jury.

"Negroes were neither excluded nor discriminated against in the selection of either the grand or petit jury which performed in this case. One Negro woman served on the grand jury and at least one prospective Negro juror was tendered to the defendant for the petit jury and was excused or rejected by his counsel. It has been the consistent holding in this jurisdiction, certainly since the case of *S. v. PEOPLES*, 131 N. C. 784, 42 S. E. 814, that the intentional, abritrary and systematic exclusion of any portion of the population from jury service, grand or petit, on account or race, color, creed, or national origin, is at variance with the fundamental law and cannot stand. On the other hand, it has also been the holding with us, consistent with the national authorities, *AKINS v. TEXAS*, 325 U. S. 398, 89 L. Ed. 1692, that it is not the right of any party to be tried by a jury of his own race, or to have a representative of any particular race on the jury. It is his right, however, to be tried by a competent jury from which members of his race have not been unlawfully excluded. *S. v. SPELLER*, 231 N. C. 549, 57 S. E. 2d 759; *S. v. KORITZ*, 227 N. C. 552, 43 S. E. 2d 77; *BALLARD v. U. S.*, 329 U. S. 187, 91 L. Ed. 181. No such exclusion appears here. 'The law not only guarantees the right of trail by jury, but also the right of trial by a proper jury; that is to say, a jury possessing the qualifications contemplated by law,' and in the selection of which there has been neither inclusion nor exclusion because of race. *HINTON v. HINTON*, 196 N. C. 341, 145 S. E. 615; *CASSELL v. TEXAS*, 339 U. S. 282" . . .

"Finally, and in conclusion of this phase of the case, it may be said the defendant has shown no error effecting

any of his substantial rights. He has pointed out no racial discrimination in the selection of the jury list, the grand jury or the petit jury which considered the indictment against him. Nor does he specifically so contend. He only says or suggests that there might have been discrimination against his race. He concedes that neither equal nor proportional representation of race is a constitutional requisite in the selection of juries. *AKINS v. TEXAS*, supra. Indeed, proportional racial limitation is actually forbidden. *CASSELL v. TEXAS*, supra. The defendant's position is one of possible discrimination, not one of racial imbalance in jury composition. A person accused of crime is entitled to have the charges against him performed by a jury in the selection of which there has been neither inclusion nor exclusion because of race. *CASSELL v. TEXAS*, supra. This, the defendant has had in respect of both the grand and petit juries which performed in the case, or, at least, the contrary in respect of neither has been made to appear on the record. Hence, his claim of jury defect or irregularity in unavailing."

The United State Court of Appeals for the Fourth Circuit, upon appeal to it, said in a per curiam opinion, BROWN v. ALLEN, 192 F. 2d 477, 478:

"These are appeals from denials or writs of habeas corpus in cases in which appellants have been convicted of capital felonies and sentenced to death by North Carolina state courts. In both cases the questions raised in the petitions for habeas corpus had been raised and passed upon by the trial court, the action of the trial court had been affirmed by the Supreme Court of the state and the Supreme Court of the United States had denied certiorari. . . . *STATE v. BROWN*, 233 N. C. 202, 63 S. E. 2d 99, certiorari denied *BROWN v. STATE OF NORTH CAROLINA*, 341 U. S. 943, 95 L. Ed. 1369, 71 S. Ct. 997. . . . In the Brown case the petition for the writ was denied without hearing, on the basis of its procedural history. We think that dismissal in both cases was clearly right. In view of the action of the state Supreme Court upon the identical questions presented to the court below and the denial of certiorari by the Supreme Court of the United States, the cases fall squarely within the rule that 'a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated.' *Ex parte Hawk*, 321 U. S. 114, 88 L. Ed. 572, 64 S. Ct. 448, 450; *DARR v. BURFORD*, 339 U. S. 200, 94 L. Ed. 764, 70 S. Ct. 587; *ADKINS v. SMYTH*, 4 Cir., 188 F. 2d. 452;

*GOODWIN v. SMYTH*, 4 Cir. 181 F. 2d 498; *STONEBREAKER v. SMYTH*, 4 Cir., 163 F. 2d 498, 499. As said by this court in the case last cited:

"'We are confronted at the outset with the fact that the case presented by petitioner is precisely the same as that in which relief was denied by the Virginia courts and in which certiorari was denied by the Supreme Court of tne United States. The rights of petitioner were fully presented in that case and the Virginia courts had full power to grant the relief asked, had they throught petitioner entitled to it. The facts were fully before the Supreme Court of the United States on certiorari; and proper respect for that court compels the conclusion that if it had thought that the record showed a denial of petitioner's constitutional rights, certiorari would have been granted and petitioner would have been afforded relief. While action of the Virginia courts and the denial of certiorari by the Supreme Court were not binding on the principle of res judicata, they were matters entitled to respectful consideration by the court below; and in the absence of some most unusual situation, they were sufficient reason for that court to deny a further writ of habeas corpus. It would be intolerable that a federal district court should release a prisoner on habeas corpus after the state courts have refused him relief in precisely the same case on a similar writ and the United States Supreme Court had refused to review their action on certiorari. This would be, in effect, to permit a federal district court to review the Supreme Court of the United States as well as the highest court of the state. The rule in such cases was stated in the case of *WHITE v. RAGEN*, 324 U. S. 760, 764, 765, 65 S. Ct. 978, 981, 89 L. Ed. 1348, relied on by the court below, as follows:

"'If this Court denies certiorari after a state court decision on the merits, or if it reviews the case on the merits, a federal District Court will not usually re-examine on habeas corpus the questions thus adjudicated. *Ex parte Hawk, supra*, 321 U. S. (114) 118, 64 S. Ct. 448, 88 L. Ed. 572.'

"'The citation of *Ex parte Hawk* shows what the court had in mind in the use of the words 'will not usually re-examine' in the statement just quoted; for the court had pointed out in that case the sort of cases in which the district court would be justified in granting habeas corpus notwithstanding the denial of certiorari in cases where the state court had refused to grant relief. These were

cases where resort to state court remedies had failed to afford a full and fair adjudication of the federal contentions raised either because the state afforded no remedy or because the remedy afforded proved in practice unavailable or seriously inadequate'."

In his opinion, 98 F. Supp. 866, the District Court says:

"Before pleading to the indictment the petitioner moved to quash upon the ground that there had been systematic and abitrary exclusion of Negroes solely on account of race. The Court heard evidence from the petitioner and afforded him and his counsel full and fair opportunity to substantiate the contention. Upon such evidence the trial Court ruled against petitioner and denied the motion. The evidence and conclusion of the trial court are in the record." . . .

"Upon appeal to the Supreme Court of North Carolina, the petitioner assigned as errors both the ruling of the trial Court in overruling the motion to quash the indictment and the admission of the confessions as evidence. The Supreme Court of North Carolina upheld the conviction and affirmed the judgment, saying in its opinion: 'A person accused of crime is entitled to have the charges against him performed by a jury in the selection of which there has been neither inclusion nor exclusion because of race. This the defendant had had in both the grand and petit juries which performed in the case, or, at least, the contrary in respect to neither has been made to appear on the record. Hence, his claim of jury defect or irregularity is unavailing;' . . .

"A petition for writ of certiorari was then filed in the United States Supreme Court, assigning as ground the two alleged errors presented to the Supreme Court of North Carolina, and on May 28, 1951, this petition was denied by order containing this notation: 'Mr. Justice Black and Mr. Justice Douglas are of the opinion that certiorari should be granted.'

"It is not asserted or even suggested by the petitioner that adequate remedies are not provided by North Carolina law to correct the wrongs about which he now complains; in fact, it must be admitted that such remedies existed and that he and his counsel took full advantage of them. It cannot be maintained, in fact, it is not alleged, that petitioner was in any way or to any extent limited or restricted in his resort to such remedies. No one, upon the record, would conclude that the action of

the State Courts in deciding the questions now raised was indifferently or lightly considered. The decision in each instance was reached after painstaking and careful procedure in accordance with law and practice and only after petitioner had had his full say. *The petitioner has had his day in Court and his present positions have been rejected by a Court which had and did not lose jurisdiction and on a record which seems to demonstrate that petitioner was given a fair and impartial trail, in which he was accorded all rights guaranteed to him by the federal Constitution and dictated by the principles of justice. In addition, the Supreme Court of the United States has refused to review such action of the State Court.* The record does not present any unusual situation which would justify the issue of the writ and, therefore, the petition for such writ has been denied."

## II.

## THE CONSTITUTIONAL ISSUE AS TO WHETHER PETITIONER'S CONFESSIONS WERE INVOLUNTARY OR EXTORTED BY VIOLENCE, DURESS, OR PROMISE OF REWARD, HAVING BEEN HEARD AND DETERMINED ADVERSELY TO PETITIONER IN THE STATE TRIAL COURT, UPON APPEAL IN THE STATE SUPREME COURT, AND PETITION TO THE SUPREME COURT OF THE UNITED STATES FOR WRIT OF CERTIORARI TO REVIEW JUDGMENT OF THE STATE SUPREME COURT HAVING BEEN DENIED, THE ISSUE CANNOT NOW BE QUESTIONED OR RETRIED ON THE SAME EVIDENCE IN A HABEAS CORPUS PROCEEDING IN FEDERAL COURT.

The great weight of authority supports the view that on a habeas corpus hearing, the admission in evidence of confessions is not a matter that can be tried again on such a hearing. On habeas corpus hearings, the admission or rejection of confessions are looked upon as matters of evidence to be ruled upon by the trial Court, and the trial Court does not lose jurisdiction even though it should make an erroneous ruling thereon. This principle is upheld by many cases, both in the Supreme Court of the United States and in the various

Circuit Courts of Appeal. We now cite some of these cases as follows:

COLLINS v. McDONALD, 258 U. S. 416, 66 L.ed. 692
EAGLES v. U. S., 329 U. S. 304, 91 L.ed. 308, 315
SCHRAMM v. BRADY, 4 Cir., 129 Fed. (2d) 109
MILLER v. HIATT, 3 Cir., 141 Fed. (2d) 691
BURALL v. JOHNSON, 9 Cir., 134 Fed. (2d) 614
BURALL v. JOHNSON, D.C., Cal., 62 Fed. Supp. 825
U. S. v. LOWREY, D.C., Pa., 84 Fed. Supp. 804
O'GRADY v. HIATT, D.C., Pa., 52 Fed. Supp. 213
(Affirmed) 142 Fed. (2d) 558
HARLAN v. McGOURIN, 218 U. S. 442, 54 L.ed. 1101
SNELL v. MAYO, 5 Cir., 173 Fed. (2d) 704
EURY v. HUFF, App. D.C., 146 Fed. (2d) 704
MASSEY v. HUMPHREY, D.C. Pa., 85 Fed. Supp. 534
U. S. ex rel. v. HIATT, D.C. Pa., 33 Fed. Supp. 1002
FIGUEROA v. SALDANA, 1 Cir., 23 Fed. (2d) 327
U. S. ex rel. HOLLY v. PA., D.C. Pa., 81 Fed. Supp. 861
(Affirmed) 3 Cir., 174 Fed. (2d) 480
PERRY v. HIATT, D.C. Ark. 33 Fed. Supp. 1023
BURROUGHS v. SANFORD, D.C. Ga., 52 Fed. Supp. 919
WALLACE v. HUNTER, 10 Cir., 149 Fed. (2d) 59
SEDORKO v. HUDSPETH, 10 Cir., 109 Fed. (2d) 475
SMITH v. LAWRENCE, 5 Cir., 128 Fed. (2d) 822

In the case of COLLINS v. McDONALD, 258 U. S. 416, 66 L.ed. 692, the Court said:

> "It is also charged that there was no evidence of guilt before the court-martial other than the confession of the accused, which, it is averred, was made, under oath, to and at the instance of his superior officer, under duress, whereby it is alleged he was compelled to become a witness against himself, in violation of the Constitution of the United States. This, in substance, is a conclusion of the pleader, unsupported by any reference to the record, and, at most, was an error in the admission of testimony, which cannot be reviewed in a habeas corpus proceeding. Cases, *supra*."

In the case of EAGLES v. U. S., 329 U.S. 304, 91 L.ed. 308, 315, the Court said:

"But it is not enough to show that the decision was

wrong, United States ex rel, Tisi v. Tod, 264 US 131, 68 L.ed. 590, 44 S Ct. 260, supra, or that incompetent evidence was admitted and considered. United States ex rel. Vajtauer v. Commissioner of Immigration, 273 US 103, 71 L ed 560, 47 S Ct 302. If it cannot be said that there were procedural irregularities of such a nature or magnitude as to render the hearing unfair, Bridges v. Wixon, supra (326 US p 156, 89 L ed 2116, 75 S Ct 1443), or that there was no evidence to support the order, United States ex rel, Vajtauer v. Commissioner (US) supra, the inquiry is at an end."

In the case of SCHRAMM v. BRADY, 4 Cir., 129 Fed. (2d) 109, the Court said:

"Nor can the writ of habeas corpus be used to review alleged error of the state court in admitting evidence of a confession, for habeas corpus cannot be used as a writ of error."

In the case of U. S. v. LOWREY, D.C., Pa., 84 Fed. Supp. 804, the Court said:

"The proceedings under 28 U.S.C.A. § 2255, being taken in the sentencing court in lieu of a writ of habeas corpus, the general principles applicable to habeas corpus apply. Consequently, the contention that the confession was secured under circumstances rendering it inadmissible presents a question of admissibility of evidence which was an appropriate matter for an appeal, and hence not subject to review by habeas corpus."

In the case of BURALL v. JOHNSON, 9 Cir., 134 F. (2d) 614, the Court said:

"The time to inquire into the circumstances of the confession was during the progress of the trial, and error committed, if any, was subject to correction on appeal."

In the case of SEDORRO v. HUDSPETH, 10 Cir., 109 Fed. (2d) 475, the Court said:

"Petitioner further complains that his immunity to self-incrimination was violated by securing from him a written confession. He charges in his petition for the writ that he was coerced into the signing of this confession and that it was secured from him under moral and physical compulsion. It is expressly stated in two separate affidavits of the special agents of the Department of Justice, who obtained the confession, that petitioner was ad-

vised in advance that he did not have to furnish any information concerning the robbery or the loot or its disposition, and that if he did, such information might be used against him in the court proceedings; * * *.

"The finding of the trial court that petitioner voluntarily signed the confession is amply sustained."

Respondent believes that the law applicable on this appeal in this respect is expressed in BIRD v. SMITH, CCA Wash., 1949, 175 F. 2d 260, thus: "Where contention that confession is involuntary is decided against defendant by state trail and supreme courts, and the same evidence is relied on in petition to United States Supreme Court for writ of certiorari, which is denied, District Court is not entitled to consider applictaion for writ of habeas corpus on same evidence and where petition for the writ is dismissed, a further petition for a certificate of probable cause of appeal will be denied."

Like the question of jury discrimination, the question of the appellant's (then defendant's) confession was presented to the Supreme Court of North Carolina. In writing the opinion for the court the late Chief Justice Stacy said with regard to the confession, S. v. BROWN, supra, at page 206:

"The only basis of challenge to the competency of defendant's confession is that he was under arrest, being held without warrant, and was in custody at the time it was given. These circumstances, taken singly or all together, unless they amounted to coercion, where not sufficient in and of themselves to render a confession, otherwise voluntary, involuntary as a matter of law and incompetent as evidence. S. v. STEFANOFF, 206 N.C. 443, 174 S.E. 411; S. v. GRAY, 192 N.C. 594, 135 S.E. 535; S. v. THOMPSON, 224 N.C. 661, 32 S.E. 2d 24; S. v. LITTERAL, 227 N.C. 527, 43 S.E. 2d 84; S. v. SPELLER, 230 N.C. 345, 53 S.E. 2d 294; S. v. BROWN, 231 N.C. 152, 56 S.E. 2d 441.

"After a preliminary investigation, pursuant to the procedure outlined in S. v. WHITENER, 191 N.C. 659, 132 S.E. 603, the trial court ruled the confession to be voluntary, and permitted the solicitor to offer it in evidence against the prisoner. S. v. GRASS, 223 N.C. 31, 25 S.E. 2d 193; S. v. HAMMOND, 229 N.C. 108, 47 S.E. 2d 704. The ruling is fully supported by the evidence, as witness especially the following questions propounded by the court and the answers of the defendant:

'Q. Clyde, let me ask you a question. From the time you were put in custody on the 19th of June, up until after Mr. Price was employed, came over there to the jail to see you, after you made all the statements you made in this case, were you ever mistreated in any manner by these officers, any of the officers? A. No.

'Q. Was any violence used or threatened to be used against you? A. No sir.

'Q. Did anybody hit you or threaten to hit you? A. No sir.

'Q. Did anybody threaten to do you any physical injury of any kind? A. No sir.

'Q. Did anybody offer you any reward or hope of reward to make any statement? A. No sir.

'Q. Did anybody tell you that you'd get out lighter, they'd try to help you get out lighter if you'd make a statement? A. No.

'Q. And were you, at different times—at least on two occasions, I believe you said—warned that you did not have to make a statement? A. Yes sir.

'Q. You were warned at least once before you made this final statement? Is that correct? A. Yes sir.

'Q. At that time you were told that any statements which you might make would be used against you? A. Yes sir.'

"It is well understood that a free and voluntary confession is admissible in evidence against the one making it, because it is presumed to flow from a strong sense of guilt or from a love of the truth, both of which are, at times, compelling motives and powerful aids in the investigation of crimes. Just the reverse is true, however, in the case of an involuntary confession, since a statement wrung from the mind by the flattery of hope or by the torture of fear, comes in such questionable manner as to afford no assurance of its verity, and merits no consideration. *S. v. ANDERSON*, 208 N. C. 771, 182 S. E. 643; *S. v. PATRICK*, 48 N. C. 443. A confession is voluntary in law when—and only when—it was in fact voluntarily made. *S. v. JONES*, 203 N. C. 374, 166 S. E. 163; *ZIANG SUNG WAN v. UNITED STATES*, 266 U. S. 1, 69 L. Ed. 131."

And at page 208: "The court's ruling on the voluntariness of the confession is supported by the defendant's own testimony given on the preliminary inquiry. The contentions of error in its admission are without force or substance."

The same contentions were argued in the petitioner's brief in support of petition for writ of certiorari to the Supreme Court of the United States, October Term, 1950. (R. 55, 60-63).

In the case of STATE v. WHITENER, 191 N. C. 659, referred to above, Chief Justice Stacy says, *inter alia:*

> "To the introduction of this evidence (a confession) the accused, through his counsel, objected, on the ground that the confession was not given voluntarily; and the prisoner asked that the jury be withdrawn from the court room, to the end that he might interrogate the State's witneses before the court on the preliminary question as to the competency of such proposed evidence. The jury was excused, and on cross-examination by counsel for the prisoner, the witnesses for the State testified that the confession was made voluntarily, after the prisoner had been informed of his rights, and that no inducements whatever were held out to him which caused him to make it.
>
> "For the purpose of denying this evidence touching the voluntariness of his confession, the prisoner, through his counsel, asked that he be allowed to take the stand, not before the jury, nor in the cause, but before the judge, to give his version as to how the alleged confession was obtained from him. His Honor ruled that, as a matter of law, he could not hear the testimony of the defendant, in the absence of the jury, on the preliminary inquiry looking to the admissibility of the alleged confession. In this ruling we think there was error. . . ."
>
> "The case of *BRAM v. UNITED STATES,* 168 U. S. 532, 42 L. Ed., 568, contains an exhaustive review of the English and American authorities on the subject, the opinion of the court being written by Mr. Justice White, with a dissenting opinion filed by Mr. Justice Brewer. See, also, *AMMONS v. STATE,* 80 Miss., 592, as reported in 18 L. R. A. (N.S.), 768, for a collection of the pertinent authorities in a valuable note by the annotator covering the whole subject now under investigation.
>
> "After declining to hear the testimony of the defendant touching the manner in which the alleged confession was secured, the court found as a fact from the evidence of the State's witnesses, that the confession was given voluntarily, and thereupon permitted the solicitor to offer it in evidence against the prisoner.
>
> "The record, therefore, presents the question squarely as

to whether the prisoner, at his own request, was entitled, as a matter of law, to testify before the judge, in the absence of the jury, on the preliminary inquiry addressed only to the court, with respect to the admissibility of the alleged confession as evidence against him. We think the prisoner, at his own request, was entitled to be heard on this preliminary inquiry—the credibility of his testimony, of course, being a matter for the judge.

"In this jurisdiction it is the province of the judge, and not that of the jury, to determine every question, whether of law or of fact, touching the admissibility of evidence. *MONROE v. STUTTS*, 31 N. C. 49. The parties are entitled, as a matter of right, to have the judge definitely decide all questions relating to the admissibility of evidence, and to admit or reject it accordingly. *S v. DICK*, 60 N. C. 440.

"Speaking to the identical question in *S. v. ANDREWS*, 61 N. C., 205, PEARSON, C. J., said: 'It is the duty of the judge to decide the facts upon which depends the admissibility of testimony; he cannot put upon others the decision of a matter, whether of law or of fact, which he himself is bound to make.' *S. v. DICK*, 60 N. C., 440. . . . 'What facts amount to such threats or promises as make confessions not voluntary and admissible in evidence is a question of law, and the decision of the judge in the court below can be reviewed by this Court. So what evidence the judge should allow to be offered to him to establish these facts is a question of law. So whether there be any evidence tending to show that confessions were not made voluntarily is a question of law. But whether the evidence, if true, proves these facts, and whether the witnesses giving testimony to the court touching the facts are entitled to credit or not, and, in case of a conflict of testimony, which witness should be believed by the court are questions of fact to be decided by the judge; and his decision cannot be reviewed in this Court, which is confined to questions of law.'

"And further in the same opinion it is said: 'The duty of finding the facts preliminary to the admissibility of evidence is often a very embarrassing one, as in this case, where there is a conflict of testimony. But this duty must be discharged by the judge, and the evil of allowing him to let the jury also pass on these facts is this: If he decide for the prisoner and reject the evidence, that is the end of it, whereas, if he decide for the State, and can leave it to the jury to review his decision, it is an induce-

ment for him to decide pro forma for the State, and so the evidence goes to the jury without having the preliminary facts decided according to law.'

"This is the fixed law of North Carolina as settled by a long line of decisions. *S. v. DAVIS*, 63 N. C., 578; *S. v. VANN*, 82 N. C., 631; *S. v. EFLER*, 85 N. C., 585; *S. v. SANDERS*, 84 N. C., 728; *S. v. BURGWYN*, 87 N. C. 572; *S. v. CROWSON*, 98 N. C., 595; *S. v. PAGE*, 127 N. C., 513."

The officers had a right to arrest petitioner without warrant and to hold him for investigation. As authority for this position, we direct the attention of the court to the following North Carolina Statutes:

"§ 15-41. *When officer may arrest without warrant.*—Every sheriff, coroner, constable, officer of police, or other officer, entrusted with the care and preservation of the public peace, who shall know or have reasonable ground to believe that any felony has been committeed, or that any dangerous wound has been given, and shall have reasonable ground to believe that any particular person is guilty, and shall apprehend that such person may escape, if not immediately arrested, shall arrest him without warrant, and may summon all bystanders to aid in such arrest."

"§ 15-42. *Sheriffs and deputies granted power to arrest felons anywhere in state.*—When a felony is committed in any county in this State, and upon the commission of the felony, the person or persons charged therewith flees or flee the county, the sheriff of the county in which the crime was committed, and/or his bonded deputy or deputies, either with or without process, is hereby given authority to pursue the person or persons so charged, whether in sight or not, and apprehend and arrest him or them anywhere in the State."

"§ 15-46. *Procedure on arrest without warrant.*—Every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else committed to the county prison, and, as soon as may be, taken before such magistrate, who, on proper proof, shall issue a warrant and thereon proceed to act as may be required by law."

"§ 15-47. *Arresting officer to inform offender of charge, allow bail except in capital cases, and permit communica-*

*tion with counsel or friends.*—Upon the arrest, detention, or deprivation of the liberties of any person by an officer in this state, with or without warrant, it shall be the duty of the officer making the arrest to immediately inform the person arrested of the charge against him, and it shall further be the duty of the officer making said arrest, except in capital cases, to have bail fixed in a reasonable sum, and the person so arrested shall be permitted to give bail bond; and it shall be the duty of the officer making the arrest to permit the person so arrested to communicate with counsel and friends immediately, and the right of such persons to communicate with counsel and friends shall not be denied."

G. S. 15-47 has been construed by the North Carolina Supreme Court in STATE v. EXUM, 213 N.C. 16, 195 S.E. 7, where the court said:

"The evidence at the trial shows that immediately after his arrest, the defendant was informed by the sheriff that he was charged with the murder of James Williams. This is a capital case. For this reason the provisions of the statute with respect to bail are not applicable to this case.

"There is no evidence in the record tending to show that after his arrest and while he was in the custody of the sheriff the defendant demanded of the sheriff that he be permitted to communicate with friends or with counsel. For this reason the provisions of the statute with respect to the right of a defendant in the custody of an officer and charged with the commission of a crime, to communicate with friends and counsel are not applicable to this case.

'Conceding, however, that the sheriff had violated the provisions of the statute, in the instant case, it would not follow that a voluntary confession made by the defendant to the sheriff would be inadmissible as evidence because of such violation. It is not so provided in the statute."

The mere detention and questioning of a suspect is not prohibited either at common law or under due process clause. LYONS v. OKLAHOMA, 322 U. S. 596, 88 L.ed. 1481; LISENBA v. CALIFORNIA, 314 U. S. 219, 239-241, 86 L.ed. 166, 181, 182.

A criminal prosecution approved by the state should not be set aside as violative of due process without clear proof that such drastic action is required to protect Federal Constitutional rights. GALLEGOS v. NEBRASKA, U. S.

....., 96 L. Ed. (Adv. Op. No. 3) 82, 86. Mr. Justice Reed, writing the opinion for the Court, continues:

> "While our conclusion on due process does not necessarily follow the ultimate determinations of judges or juries as to the voluntary character of a defendant's statements prior to trial, the better opportunity afforded those state agencies to appraise the weight of the evidence, because the witnesses gave it personally before them, leads us to accept their judgment insofar as facts upon which conclusions must be reached are in dispute. The state's ultimate conclusion on guilt is examined from the due process standpoint in the light of facts undisputed by the state.[2] That means not only admitted facts but also those that can be classified from the record as without substantial challenge."
>
> [2] *LYONS v. OKLAHOMA*, 322 U. S. 596, 603, 88 L. ed. 1481, 1486, 64 S. Ct. 1208; *MALINSKI v. NEW YORK*, 324 US 401, 404, 89 L. ed. 1029, 1032, 65 S. Ct. 781; *HALEY v. OHIO*, 332 US 596, 599, 92 L. ed. 224, 228, 68 S. Ct. 302; *WATTS v. INDIANA*, 338 US 49, 51, 93 L. ed. 1801, 1804, 69 S. Ct. 1347, 1357. Cf. *LISENBA v. CALIFORNIA*, 314 US 219, 238-241, 86 L. ed. 166, 180-182, 62 S. Ct. 280.
>
> "As state courts also are charged with applying constitutional standards of due process, in recognition of their superior opportunity to appraise conflicting testimony, we give deference to their conclusions on disputed and essential issues of what actually happened. See note 2, supra."

p. 88. "Compliance with the McNabb rue is required in federal courts by this Court through its power of supervision over the procedure and practices of federal courts in the trial of criminal cases. That power over state criminal trails is not vested in this Court. A confession can be declared inadmissible in a state criminal trial by this Court only when the circumstances under which it is received violate those 'fundamental principles of liberty and justice' protected by the Fourteenth Amendment against infraction by any state."

p. 89. "As pointed out in the Carignan Case, (*UNITED STATES v. CARIGNAN*) ..... US ....., 96 L. Ed. (Adv. Op. No. 2) 57, 72 S. Ct. ....., the mere fact 'that a confession was made while in the custody of the polices does not render it inadmissible.'

Mr. Justice Jackson, in a concurring opinion says: "There is not the slightest proof or suggestion by the defendant or his counsel that Nebraska officials abused, threatened, or unduly questioned him. On the contrary, he willingly told how he beat his paramour to death in a fit of jealousy. The only complaint against Nebraska is that it detained Gallegos an unduly long time before arraignment. . . ."

Mr. Jackson continues: "But it is complained that Nebraska held him too long (just how long is too long we never are told) without arraignment. . . . *Certainly due process does not require that charges be placed hurriedly and recklessly.* . . . (Emphasis added)

The cases cited and relied on by petitioner differ from the instant case. They differ in their forums, their procedure, or else show long continued questioning in relays by officers, brutal treatment, threats, torture, or combination of these factors, plus illegal detention. We look briefly at some of these cases:

WALEY v. JOHNSTON, 316 U.S. 101. The petition alleged coercion, intimidation and threats. This was from a conviction in a Federal Court.

VON MOLTKE v. GILLIES, 332 U.S. 708. This also was from a Federal Court in which the petitioner had pled guilty. In her petition she alleged coercion and that she did not understand what she was doing when she waived her right to counsel.

CHAMBERS v. FLORIDA, 309 U.S. 227. A group of young Negroes were arrested and held in jail without formal charges. They were not permitted to see counsel or friends, and believing they were in danger of mob violence, made confessions at the end of an all-night session, following five days of questioning, each by himself, by State officers and other white citizens in the present of white men and after a previous confession had been pronounced "unfit" by the prosecuting attorney.

WHITE v. TEXAS, 310 U.S. 530. Here petitioner, an illiterate farm hand, was held in jail for several days without counsel and out of touch with friends. For several nights he was taken, hand-cuffed, by armed officers into the woods for interrogation. In jail, he was placed by himself, where the sheriff kept watching the petitioner and talking to him. A confession was obtained after questioning by the county attorney from 11:00 P.M. to

3:30 A.M. the next morning. During this period, the officers who had taken him to the woods were in and out of the room.

LISENBA v. CALIFORNIA, 314 U.S. 219. The petitioner in this case was held incommunicado for a long period of time, was refused counsel and questioned from Sunday night until Tuesday morning. The petitioner made two confessions, one of which was not admitted, but the second one was ruled to be valid. The judgments below were affirmed. The court stating that it could not hold the illegal conduct of the officers coerced the confessions.

HYSLER v. FLORIDA, 315 U.S. 411. In this case the petitioner alleged that the testimony of two witnesses implicating him were perjured. He also alleged that they had testified falsely against him because they were "coerced, intimidated, threatened with violence and otherwise abused and mistreated" by the police and were "promised immunity from the electric chair" by the District Attorney.

WARD v. TEXAS, 316 U.S. 547. Here the petitioner was arrested without a warrant by a sheriff from another county; he was removed to a county more than one hundred miles away and for three days was driven about from county to county and questioned continuously by various officers who told him of threats of mob violence, and there was little probability of such event. The sheriff testified that he saw evidence of cigarette burns on the petitioner's body.

ASHCRAFT v. TENNESSEE, 322 U.S. 143. The petitioner was subjected to a thirty-six hour period of practically continuous questioning, seated under powerful electric lights. This questioning was done by relays of officers and experienced investigators. There is no comparison in the case to the facts now before the Court.

WATTS v. INDIANA, 338 U. S. 49. The petitioner Watts has been held for six days, during which time except for Sunday, he was questioned by relays of officers from 5:30 or 6:00 P.M. until 2:00 or 3:00 A.M. He was not taken before a magistrate, as required by Indiana law, and was not advised of his constitutional rights.

LEE v. MISSISSIPPI, 332 U.S. 742. This was a case which went to the Supreme Court of the United States on a writ of certiorari to the Supreme Court of Mississippi

to review the judgment of that Court. (This is the same procedure which was followed in the instant case, when certiorari was denied. The denial of certiorari in the instant case lends strong support to the conviction that the Supreme Court of the United States did not find that the petitioner Brown was deprived of any due process or any of his constitutional rights by reason of the admission of his confession in evidence in the trial in the Forsyth County Superior Court.)

BROWN v. MISSISSIPPI, 297 U.S. 278. This likewise went to the Supreme Court of the United States upon a writ of certiorari to the Supreme Court of the State of Mississippi. The evidence was clear in this case that the confessions were extorted by brutality and violence. There was no dispute as to the facts of brutality, torture and coercion to obtain the confessions. (Like the case of Lee v. Mississippi, supra, this furnishes strong support to the conclusion that if the Supreme Court of the United States had thought that the constitutional rights of Clyde Brown had been violated it would have issued a writ of certiorari to the Supreme Court of North Carolina to review its judgment upon appeal.)

The petitioner quotes from the case of TURNER v. PENNsylvania, 338 U.S. 62-67, 93 L.ed. 1810, at length. It should be borne in mind, however, that the facts of that case are different. Turner was questioned by relays of officers from four to six hours a day for five days. He was not permitted to see friends or relatives and was not informed of his right to remain silent.

We say, therefore, that where the findings of the state court are supported by substantial evidence, the same should be upheld, and, in fact, as determined by the cases of LISENBA v. CALIFORNIA, supra, and LYONS v. OKLAHOMA, supra, the same are final unless unconstitutionality is shown by admitted facts.

At the trial of petitioner in the Superior Court in Forsyth County, the Trial Judge heard all evidence that petitioner's counsel desired to offer and the State's evidence in regard to the voluntariness of the confession. There are thirty-nine pages in the transcript of the trial to the Supreme Court of North Carolina relating to this phase of the examination, beginning on page 94 of the transcript and running through page 133. All of this examination was in the absence of the

jury, which is in accordance with the practice of North Carolina. In this examination three witnesses testified, including the petitioner, Clyde Brown. The record of the testimony of Clyde Brown itself consumes nineteen pages, beginning at page 107 of the transcript and ending on page 126. The high lights of his testimony with regard to the salient points are as follows:

"Q. After she (Mattie Mae) left, you told Capt. Burke that you did come uptown and that you did go to the Clifton Radio Shop, didn't you?
"A. Yes, sir. (Tr. p. 114)
"Q. When you went in who was in there?
"A. Nobody but her.
"Q. But who?"
"A. That girl.
"Q. The girl? Well, she was all right then when you saw the man come out, wasn't she?
"A. Yes.
"Q. Well, what did you mean by telling them that you heard some moaning under the desk, table there, and eased the door shut? What did you tell them that for then?
"A. I told them a lot of different stories.
"Q. You admit that you never told them the truth at any of these preliminary meetings that they had with you? Isn't that right?
"A. That is right." (Tr. p. 115)
"Q. You told your attorney that they did everything they could possibly do to make you comfortable down there, didn't you?
"A. Yes, sir." (Tr. p. 118)
"Q. What did they do with you?
"A. Mr. Reid and Mr. Carter sat down and talked to me.
"Q. How long did they talk with you?
"A. I don't know—about a half an hour.
"Q. Did you tell them the truth on that occasion?
"A. Yes.
"Q. You told them that you did go in there to rob the girl and took her pocketbook, but you didn't rape her, didn't you?
"A. Yes.
"Q. And you told them the truth on that occasion?
"A. Yes.
"Q. You told them how you beat her, didn't you?
"A. Yes.

"Q. And that was the truth, wasn't it?
"A. Yes.
"Q. They didn't in any way threaten you at that time, did they?
"A. No.
"Q. Didn't mistreat you in any way, did they?
"A. No.
"Q. On that occasion they told you and warned you about what your rights were, didn't they?
"A. Yes.
"Q. But they did tell you that any statement you made would be used against you or for you, as the case may be, didn't they?
"A. (The witness nodded his head.)" (Tr. 119-120).

"Q. On this Saturday morning you told Mr. Carter and Mr. Reid that you went to the City Market and called this girl to Grossman's Record Shop for the purpose of getting her away from the place, so you could search it, didn't you?
"A. Yes.
"Q. And that when you called her on the phone, you pretended to be a woman and inquired about a radio, didn't you?
"A. Yes.
"Q. You told them that you then went to the place and found her in it, didn't you?
"A. (No answer.)
"Q. Didn't you tell them that? Isn't that correct? Didn't you tell them that on this Saturday morning? Answer the question! Didn't you?
"A. Saturday morning?
"Q. This Saturday morning when you were talking to Mr. Carter and Mr. Reid; after you told them that you had called her to the telephone and pretended to be a woman, then you told them you went around to the place, didn't you?
"A. Yes Sir." (Tr. 121-122)

The examination by the court is reported in the opinion of the Supreme Court of North Carolina in *STATE v. BROWN*, supra, (p. 27)

"Q. You remember telling them where to locate the pocketbook?
"A. Yes." (Tr. 125)
"Q. Don't you remember telling Mr. Carter and Mr. Reid,

'I didn't tell you all the truth, and I want to tell it to you now,' on that Monday?

"A. No.

"Q. You don't even remember having a conversation on that day? You don't deny having it, do you?

"A. No sir.

"Q. What?

"A. I don't deny it.

"Q. You don't deny it?

"A. No.

"Q. Well, then, you do remember it?

"A. I do remember it, but I don't remember all of it." (Tr. 125-126)

After examination of all the witnesses the Court found the following facts:

"It appearing to the Court from the foregoing testimony that the defendant was not denied the right to employ counsel; that he was warned that any statement which he might make could be used against him, and that he was not required to make any statement; and it further appearing to the Court that the defendant was not in any manner physically mistreated, threatened or otherwise coerced; and it further appearing to the Court that the defendant was not offered any reward, hope of reward, promised any immunity or hope of immunity for making said statements;

"The Court, therefore, finds as a fact that said statements were freely and voluntarily given and are competent."

"To the Court's ruling the defendant, in apt time, excepts —EXCEPTION NO. 17." (Tr. 133)

## CONCLUSION

The respondent respectfully urges upon the Court his position that the petitioner is attempting to retry in a habeas corpus proceeding in the federal court and on the same evidence the same questions which have been heard and passed upon by both the trial and the Supreme Court of the State of North Carolina, and the same questions which have been presented to this Court in a petition for a writ of certiorari, which this court has denied, and that petitioner has no right to have these matters re-heard and re-tried on the same evidence in the federal district court. It is respondent's conviction

that the District Court was correct in denying the writ of habeas corpus, and dismissing the petition and in vacating the stay of execution of the judgment of the State Court.

It is respondent's position that this case is like the case of ADKINS v. SMYTH, which was heard by the Court of Appeals, 4 Cir., as case No. 6255, and in which a *per curiam* opinion was filed April 10, 1951, (188 F 2d 452). That opinion expresses the law, which the respondent believes applicable to the instant case as follows:

> ". . . In view of the action of the Supreme Court of Appeals of the State upon the very question presented to the court below and the denial of certiorari by the Supreme Court of the United States, the case falls squarely within the rules that 'a federal district court will not usually reexamine on habeas corpus the question thus adjudicated' EX PARTE HAWK, 321 U.S. 114; DARR v. BURFORD, 339 U.S. 200; GOOODWIN v. SMYTH, 4 Cir. 181 F. 2d 498; STONEBREAKER v. SMYTH, 4 Cir., 163 F. 2d 498. As said by this court in the case last cited: 'We are confronted at the outset with the fact that the case presented by petitioner is precisely the same as that in which relief was denied by the Virginia courts and in which certiorari was denied by the Supreme Court of the United States. The rights of petitioner were fully presented in that case and the Virginia courts had full power to grant the relief asked, had they thought petitioner entitled to it. The facts were fully before the Supreme Court of the United States on certiorari; and proper respect for that court compels the conclusion that if it thought that the record showed a denial of petitioner's constitutional rights, certiorari would have been granted and petitioner would have been afforded relief. While action of the Virginia courts and the denial of certiorari by the Supreme Court were not binding on the principle of res judicata, they were matters entitled to respectful consideration by the court below; and in the absence of some most unusual situation, they were sufficient reason for that court to deny a further writ of habeas corpus. It would be intolerable that a federal district court should release a prisoner on habeas corpus after the state courts have refused him relief in precisely the same case on a similar writ and the United States Supreme Court has refused to review their action on certiorari. This would be, in effect, to permit a federal district court to review the Supreme Court of the United States as well as the highest court of the state. The rule in such cases was

stated in the case of WHITE v. RAGEN, 324 U.S. 760, 764, 765, 65 S. Ct. 978, 981, 89 L.ed. 1348, relied on by the court below as follows:

"'If this court denies certiorari after a state court decision on the merits, or if it reviews the case on the merits, a federal district court will not usually re-examine on habeas corpus the questions thus adjudicated. EX PARTE HAWK, supra, 321 U.S. 118, 64 S. Ct. 448, 88 L.ed 572'."

In writing his memorandum opinion in denying the writ the Court below says BROWN v. CRAWFORD, 98 F. Supp. 866 (R. 26-24) beginning at page 27:

"It is not asserted or even suggested by the petitioner that adequate remedies are not provided by North Carolina law to correct the wrongs about which he now complains; in fact, it must be admitted that such remedies existed and that he and his counsel took full advantage of them. It cannot be maintained, in fact, it is not even alleged, that petitioner was in any way or to any extent limited or restricted in his resort to such remedies. No one, upon the record, would conclude that the action of the State Courts in deciding the questions now raised was indifferently or lightly considered. The decision in each instance was reached after painstaking and careful procedure in accordance with law and practice and only after petitioner had had his full say. *The petitioner has had his day in Court and his present positions have been rejected by a Court which had and did not lose jurisdiction and on a record which seems to demonstrate that petitioner was given a fair and impartial trial, in which he was accorded all rights guaranteed to him by the federal Constitution and dictated by the principles of justice.* In addition, the Supreme Court of the United States has refused to review such action of the State Court. *The record does not present any unusual situation which would justify the issue of the writ and, therefore, the petition for such writ has been denied.* (Emphasis added)

"It would serve no good purpose to review the cases. Two cases decided by our Circuit Court of Appeals clearly support, it seems, the conclusion reached. These are: STONEBREAKER v. SMITH, 163 Fed. 2nd. 498, and JERRY ADKINS v. W. FRANK SMITH, decided April 10, 1951. (And the opinion quotes from the Adkins case much that appears above).

*"There appears no semblance of reason for a departure from the general rule laid down in these two cases."* (Emphasis added)

In this petition for habeas corpus in the Federal Courts the petitioner, Clyde Brown, who admitted assaulting, brutally beating, robbing and raping a 17-year old girl who was alone at her father's radio shop, attempts to put on trial the judicial system of North Carolina, the County Commissioners of Forsyth County, the Grand Jury which indicted him, and the Judge who tried him. It is noteworthy that petitioner does not take any exception to the constitution of the petit jury which tried him. In fact his counsel stipulates with the Solicitor that of the regular veniremen summoned for the trial, of the 37 jurors 8 (21%) were Negroes; that of the 20 special veniremen, 3 (15%) were Negroes. Under the system of jury selection for North Carolina all of these venirement came from the same box containing the 40,000 names as was testified to by those in charge of making up the jury list. This respondent respectfully contends that the petition has no right to this.

Mr. Justice Jackson, in his dissenting opinion in *CASSELL v. TEXAS*, 339 U.S. 282, 301, 94 L.ed. 839, 854, says:

> "This Court never has explained how discrimination in the selection of a Grand Jury, illegal through it be, has prejudiced a defendant whom a trial jury, chosen with no discrimination, has convicted."

And again (339 U. S. 282, 302; 94 L.ed. 839, 855):

> "The grand jury is a very different institution (from a trial jury). The States are not required to use it at all. *HURTADO v. CALIFORNIA*, 110 U.S. 516; 28 L. Ed. 232, 4 S. Ct. 111, 292. Its power is only to accuse, not to convict. Its indictment does not even create a presumption of guilt; all that it charges must later be proved before the trial jury, and then beyond a reasonable doubt. The grand jury need not be unanimous. It does not hear both sides but only the prosecution's evidence, and does not face the problem of a choice between two adversaries. Its duty is to indict if the prosecution's evidence, unexplained, uncontradicted and unsupplemented, would warrant a conviction. If so, its indictment merely puts the accused to trial. The difference between the function of a trial jury and the function of a grand jury is all the

difference between deciding a case and merely deciding that a case should be tried.

"It hardly lies in the mouth of a defendant whom a fairly chosen trial jury has found guilty beyond reasonable doubt, to say that his indictment is attributable to prejudice. . . ."

In this case the District Court was able to view the facts on which the opposing parties relied and upon these facts found that applicant was not entitled to the writ (R. 29, 35).

This procedure is authorized by the statute, 28 USCA § 2243, and is approved in the opinions of this Court. WALKER v. JOHNSTON, 312 US 275, 85 L. ed. 830, the case cited by petitioner in support of his contention that the District Court is required to issue the writ, hold a hearing and take testimony, approves this procedure. One question presented in that case is: "(1) Was the District Court, on the filing of the petition, bound forthwith to issue the writ and have the petitioner produced in answer to it?" (p. 283). In response to this question the court says, (p. 284): "It will be observed that if, upon the face of the petition, it appears that the party is not entitled to the writ, the court may refuse to issue it. *Since the allegations of such petitions are often inconclusive, the practice has grown up of issuing an order to show cause, which the respondent may answer. By this procedure the facts on which the opposing parties rely may be exhibited, and the court may find that no issue of fact is involved. In this way unless grant of the writ* with consequent production of the prisoner and the witnesses may be avoided *where from undisputed facts or from incontrovertible facts, such as those recited in a court record, it appears, as matter of law, no cause for granting the writ exists. . . . This practice has long been followed by this court and by the lower courts.* It is a convenient one, deprives the petitioner of no substantial right, if the petition and traverse are treated, as we think they should be, as together constituting the application for the writ, and the return to the rule as setting up the facts throught to warrant its denial, and if issuesof fact emerging from the pleadings are tried as required by the statute." (Emphasis added). *Ex parte QUIRIN*, 317 US 24, 87 L. ed. 10.

In view of the record and the applicable law, the respondent most respectfully contends that the order of the Circuit

Court affirming the order of the District Court denying the writ of habeas corpus should be affirmed.

Respectfully submitted,

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# APPENDIX

Chapter 7, General Statutes of North Carolina:

§ 7-63. *Original jurisdiction.*—The superior court has original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court; and of all criminal actions in which the punishment may exceed a fine of fifty dollars, or imprisonment for thirty days; and of all such affrays as shall be committeed within one mile of the place where, and during the time, such court is being held; and of all offenses whereof exclusive original jurisdiction is given to justices of the peace, if some justice of the peace shall not within twelve months after the commission of the offense proceed to take official cognizance thereof.

Chapter 14, General Statutes of North Carolina:

§ 14-21. *Punishment for rape.*—Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the state's prison, and the court shall so instruct the jury.

Chapter 9, General Statutes of North Carolina:

§ 9-1. *Jury list from taxpayers of good character.*—The board of county commissioners for the several counties, at their regular meetings on the first Monday in June in the year 1947, or the jury commissions or such other legally constituted body as may in the respective counties be charged by law with the duty of drawing names of persons for jury service, at the times of their regular meetings, and every two years thereafter, shall cause their clerks to lay before them the tax returns for the preceding year for their county, and a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age, from which lists the board of county commissioners or such jury commissions shall select the names of



such persons who reside in the county who are of good moral character and have sufficient intelligence to serve as members of grand and petit juries. A list of the names thus selected by the board of county commissioners or such jury commissions shall be made out by the clerk of the board of county commissioners or such jury commissions and shall constitute the jury list of the county and shall be preserved as such.

The clerk of the board of county commisioners or such jury commissions, in making out the list of names to be laid before the board of county commissioners or such jury commissions, may secure said lists from such sources of information as deemed reliable which will provide the names of persons of the county above twenty-one years of age residing within the county qualified for jury duty. There shall be excluded from said lists all those persons who have been convicted of any crime involving moral turpitude or who have been adjudged to be non compos mentis.

§ 9-2. *Names on list put in box.*—The commissioners at their regular meeting on the first Monday in July in the year nineteen hundred and five, and every two years thereafter, shall cause the names on their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions marked No. 1 and No. 2, respectively, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the board of commissioners, and the box by the clerk of the board.

§ 9-3. *Manner of drawing panel for term from box.*—At least twenty days before each regular or special term of the superior court, the board of commissioners of the county shall cause to be drawn from the jury box out of the partition marked No. 1, by a child not more than ten years of age, thirty-six scrolls except when the term of court is for the trials of civil cases exclusively, when they need not draw more than twenty-four scrolls. The persons whose names are inscribed on said scrolls shall serve as jurors at the term of the superior court to be held for the county ensuing such drawing, and for which they are drawn. The scrolls so drawn to make the jury shall be put into the partition marked No. 2. The said commissioners shall at the same time and in the

same manner draw the names of eighteen persons who shall be summoned to appear and serve during the second week, and a like number for each succeeding week of the term of said court, unless the judge thereof shall sooner discharge all jurors from further service. The said commissioners may, at the same time and in the same manner, draw the names of eighteen other persons, who shall serve as petit jurors for the week for which they are drawn and summoned. The trial jury which has served during each week shall be discharged by the judge at the close of said week, unless the said jury shall be then actually engaged in the trial of a case, and then they shall not be discharged until the trial is determined.

§ 9-4. *Local modifications as to drawing panel*—

In Forsyth county the board of county commissioners is authorized and empowered to draw as jurors from the box, as provided in the preceding section, an additional number of jurors to those now provided by law. At all civil terms, regular and special, for the first week thirty jurors shall be drawn and summoned, and likewise for the second week. At all criminal terms, regular and special, for the first week forty-two jurors shall be drawn and summoned.

For the second week thirty jurors shall be drawn and summoned. . . .

§ 9-14. *Jury sworn; judge decides competency.*—The clerk shall, at the beginning of the court, swear such of the petit jury as are of the original panel, to try all civil cases; and if there should not be enough of the original panel, the talesmen shall be worn. The petit jurors of the original panel, as well as talesmen, shall be sworn as prescribed in the chapter entitled Oaths. Nothing herein shall be construed to disallow the usual challenges in law to the whole jury so sworn or to any of them; and if by reason of such challenge, any juror is withdrawn, his place on the jury shall be supplied by any of the original venire, or from the bystanders qualified to serve as jurors. The judge or other presiding officer of the court shall decide all questions as to the competency of jurors in both civil and criminal actions.

§ 9-19. *Exemptions from jury duty.*—All practicing physicians, licensed druggists, telegraph operators who are in the



regular employ of any telegraph company or railroad company, train dispatchers who have the actual handling of either freight or passenger trains, regularly licensed pilots, regular ministers of the gospel, officers or employees of a state hospital for the insane, active members of a fire company, funeral directors and embalmers, printers and linotype operators, all millers of grist mills, all United State railway postal clerks and rural free delivery mail carriers, locomotive engineers, brakemen and railroad conductors in active service, radio broadcast technicians, announcers, and optometrists, registered or practical nurses in active practice and practicing attorneys at law, and all members of the national guard. North Carolina state guard and members of the civil air patrol, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, who comply with and perform all duties required of them as members of the national guard, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, shall be exempt from service as jurors.

§ 9-24. *How grand jury drawn.*—The judges of the superior court, at the terms of their courts, except those terms which are for the trial of civil cases exclusively, and special terms for which no grand jury has been ordered, shall direct the names of all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first eighteen drawn shall be a grand jury for the court; and the residue shall serve as petit jurors for the court.

§ 9-26. *Exceptions for disqualifications.*—All exceptions to grand jurors for and on account of their disqualifications shall be taken before the jury is sworn and impaneled to try the issue, by motion to quash the indictment, and if not so taken, the same shall be deemed to be waived. But no indictment shall be quashed, nor shall judgment thereon be arrested, by reason of the fact that any member of the grand jury finding such bills of indictment had not paid his taxes for the preceding year, or was a party to any suit pending and at issue.

Chapter 206, Public-Local Laws of 1937 (as amended by chap.

264, P-L Laws of 1947, and as amended by chap. 577, 1949 Session Laws):

§ 1. That at the first week of the first term of court for the trial of criminal cases in Forsyth County after the first day of July, one thousand nine hundred and thirty-seven, there shall be chosen a grand jury as now provided by law, and said grand jury will serve until the first day of January, one thousand nine hundred and thirty-eight, "and thereafter at the first week of the first term of the criminal court convening after the twenty-fifth day of December and June of each year there shall be chosen a grand jury to serve for a term of six months."

§ 2. The judge presiding at the time of the selection of the grand jury shall charge it as provided by law, and at any time the Judge of the Superior Court presiding over the criminal court of Forsyth County may cause said grand jury to assemble and may deliver unto said jury an additional charge.

§ 3. The judge presiding at any term of criminal court of Forsyth County may in his discretion discharge any or all of the members of the grand jury or fill any vacancies occurring in the grand jury by reason of death, removal from the county, sickness, or otherwise, and any such vacancy or vacancies shall be filled by drawing sufficient jurors to fill said vacancy or vacancies from the jury box, and said juror or jurors so drawn shall take the oath prescribed by law and shall fill out the unexpired term of the juror or jurors whose places they were drawn to fill. The presiding judge shall have the power in his discretion to appoint an assistant foreman, and said assistant foreman so appointed shall in the absence or disqualification of the foreman discharge the duties of the foreman of said grand jury.

§ 4. That at the first week of the terms of criminal court of Forsyth County at which a grand jury shall be selected in accordance with the provisions of this Act there shall be drawn and summoned sixty men in the manner now provided by law from which a grand jury shall be selected as herein provided for, and the persons drawn for service on the grand jury for the week at which said grand jury is se-

lected and who are not selected to serve on the grand jury shall serve on the petit jury: *Provided* that for the second week of the term at which the grand jury is chosen and for each week of other terms of the Superior Court of Forsyth County, civil and criminal, both regular and special, forty-four jurors shall be drawn and summoned as provided by law.

## VERNON'S TEXAS STATUTES, 1948

## TITLE 7—AFTER COMMITMENT OR BAIL AND BEFORE THE TRIAL

### CHAPTER 1.—ORGANIZATION OF THE GRAND JURY

ART. 333. *Appointment of jury commissioners.*—The District Judge shall at each term of the District Court appoint not less than three (3), nor more than five (5) persons to perform the duties of Jury Commissioners, and shall cause the sheriff to notify them of their appointment, and when and where they are to appear. Such Commissioners shall possess the following qualifications:

1. Be intelligent citizens of the county and able to read and write.
2. Be qualified jurors and freeholders in the county.
3. Be residents of different portions of the county.
4. Have no suit in said Court which requires the intervention of a jury.
5. The same person shall not act as Jury Commissioner more than once in the same year.

ART. 334. *Notified of appointment.*—The judge shall cause the proper officer to notify such appointees of such appointment, and when and where they are to appear.

ART. 335. *Oath of commissioners.*—When the appointees appear before the judge, he shall administer to them the following oath: "You do swear faithfully to discharge the duties required of you as jury commissioners: that you will not knowingly elect any man as juryman whom you believe to be unfit and not qualified; that you will not make known to any one the name of any juryman selected by you and report to the court; that you will not, directly or indirectly, converse with any one selected by you as a juryman concerning the

merits of any case to be tried at the next term of this court, until after said cause may be tried or continued, or the jury discharged."

ART. 336. *Instructed.*—The jury commissioners, after they have been organized and sworn, shall be instructed by the judge in their duties and shall then retire in charge of the sheriff to a suitable room to be secured by the sheriff for that purpose. The clerk shall furnish them the necessary stationery, the names of those appearing from the records of the court to be exempt or disqualified from serving on the jury at each term, and the last assessment roll of the county.

ART. 337. *Kept free from instrusion.*—The jury commissioners shall be kept free from the instrusion of any person during their session, and shall not separate without leave of the court until they complete their duties.

ART. 338. *Shall select grand jurors.*—The jury commissioners shall select sixteen men from the citizens of the different portions of the county to be summoned as grand jurors for the next term of the court.

ART. 339. *Qualifications.*—No person shall be selected or serve as a grand juror who does not possess the following qualifications:

1. He must be a citizen of the State, and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; but, whenever it shall be made to appear to the court that the requisite number of jurors who have paid their poll taxes can not be found within the county, the court shall not regard the payment of poll taxes as a qualification for service as a juror.
2. He must be a freeholder within the State, or a householder within the county.
3. He must be of sound mind and good moral character.
4. He must be able to read and write.
5. He must not have been convicted of any felony.
6. He must not be under indictment or other legal accusation for theft or of any felony.

ART. 340. *Names returned.*—The names of those selected as grand jurors by the commissioners shall be written upon

a paper; and the fact that they were so selected shall be certified and signed by the jury commissioners, who shall place said paper, so certified and signed, in an envelope, and seal the same, and indorse thereon the words, "The list of grand jurors selected at ..... term of the district court," the blank being for the month and year in which the term of the court began its session. The commissioners shall write their names across the seal of said envelope, direct the same to the district judge and deliver it to him in open court.

ART. 341. *List to clerk.*—The judge shall deliver the envelope containing the list of grand jurors to the clerk or one of his deputies in open court without opening the same.

ART. 344. *Clerk shall open list.*—The grand jury may be convened on the first or any subsequent day of the term. The Judge shall designate the day on which the grand jury is to be impaneled and notify the Clerk of such date; and within thirty (30) days of such date, and not before, the Clerk shall open the envelope containing the list of grand jurors, make out a copy of the names of those selected as grand jurors, certify to it under his official seal, note thereon the day for which they are to be summoned, and deliver it to the Sheriff.

ART. 349. *If less than twelve attend.*—When less than twelve of those summoned to serve as grand jurors are found to be in attendance and qualified to so serve, the court shall order the sheriff to summon such additional number of persons as may be deemed necessary to constitute a grand jury of twelve men.

ART. 352. *To test qualifications.*—When as many as twelve men summoned to served as grand jurors are in attendance upon the court, is shall proceed to test their qualifications as such.

ART. 353. *Interrogated.*—Each person who is presented to serve as a grand juror shall, before being impaneled, be interrogated on oath by the court or under his direction, touching his qualifications.

ART. 354. *Mode of test.*—In trying the qualifications of any person to serve as a grand juror, he shall be asked:

1. Are you a citizen of this State and county, and qualified to vote in this county, under the Constitution and laws of this State?

2. Are you a freeholder in this State or a householder in this county?

3. Are you able to read and write?